Nos. 01-653, 01-657

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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

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SUPPLEMENTAL BRIEF

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. ("NextWave") respectfully submit this supplemental brief pursuant to S. Ct. Rule 25.5, to address the relevance of a Public Notice issued by the Federal Communications Commission ("FCC") on September 12, 2002, proposing to allow the high bidders at the reauction of NextWave's licenses to renounce their bids.[1]

As recently as its opening brief in this case, the FCC had insisted that the principle of "auction integrity" required the winning bidders at the reauction of NextWave's licenses "to pay the full amount of their winning bids or be subject to default payments." FCC Br. at 12 n.6 (citation omitted). In the September 12th Public Notice, however, the FCC has reversed itself. Notwithstanding that the reauction bidders were on notice that the instant litigation might delay or defeat their ability to obtain NextWave's licenses,[2] the FCC now proposes to release those bidders from their bid obligations. The first proposal in the Public Notice gives winning bidders a period of time to renounce all their bids and obtain a full refund. The second allows winning bidders

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[1] Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc.*, WT Docket No. 02-276, FCC 02-248 (rel. Sept. 12, 2002) (SA1-SA12) ("Public Notice").

[2] *See* Public Notice at 2 (observing that bidders knew the reauction was contingent on "final outcome of the *NextWave* litigation") (SA4); *see also* Public Notice, *C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000*, 15 F.C.C.R. 17251, 17255-56 (2000) ("Potential bidders and interested parties should be aware that . . . . certain judicial proceedings that may relate to the licenses available in Auction No. 35 are pending . . . . [T]he auction is subject to such matters").

to affirm their bids for some individual market licenses and to renounce others. *See* Public Notice at 4 (SA6-7). These options are offered not merely to smaller businesses that qualify as "designated entities" under the FCC's rules, but also to Verizon, Voicestream, and other telecommunications giants whose winning bids constitute most of the 15.7 billion dollars bid for NextWave's licenses at reauction.

The FCC's justifications for granting such relief are telling. According to the Public Notice, "the state of the capital markets for entities . . . engaged in the provision of wireless telecommunications services . . . has continued to decline rapidly," and "troubling financial circumstances have led to difficulties in accessing capital and other problems for companies of all sizes." *Id.* at 3 (SA5). The Public Notice also acknowledges something the FCC has previously refused to admit in this litigation: "market downturns affect the value of spectrum licenses won at auctions and licensees' (or applicants') ability to meet auction payment obligations." *Id.* The Public Notice thus recognizes that, as a result of marketwide forces beyond the control of any individual bidder, even the nation's largest telecommunications companies can encounter difficulties accessing capital to meet their obligations.

Those justifications contradict the FCC's central themes in this case. Until now, the FCC has maintained that the protections of the Bankruptcy Code, and § 525 in particular, which assist debtors to work through temporary downturns in the capital markets, should not be enforced because they imperil "auction integrity." That argument is wrong because § 525 must be enforced as written irrespective of any contrary policy preferences the FCC might have. But the Public Notice makes clear just how empty the FCC's policy rationale is.

As the FCC's change of position illustrates, the integrity of auctions as a mechanism for allocating spectrum is not undermined by virtue of the fact that subsequent market changes may sometimes adversely affect a licensee's financial circumstances. Such intervening developments do not call the initial allocation into question. They are merely facts of life in a market economy, and the bankruptcy laws are designed to give the licensee a fair opportunity to weather such difficulties and remain in operation. Over the past decade, licensees that paid for their licenses up front – using funds borrowed in the private marketplace – have been forced to seek the protections of Chapter 11 due to adverse financial conditions. But the FCC, in such circumstances, has never raised concerns about "auction integrity" or challenged the allocation of those licenses. The result can be no different when the FCC steps in to provide the financing.[3] The auction mechanism has worked equally well in both situations to allocate the licenses, and normal marketplace mechanisms – including the bankruptcy laws – accommodate subsequent market downturns or other developments that create difficulties for licensees in meeting their financing obligations. Further, the FCC's interest in ensuring efficient use of the spectrum is protected by its "build out" regulations, which require C and F block licensees to build their networks within five years of obtaining licenses. 47 C.F.R. § 24.203.

The fact is that spectrum values are volatile, and the willingness of the capital markets to finance spectrum fluctuates. This is true even for behemoths such as Verizon,

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[3] *See In re Implementation of Section 309(j) of the Communications Act Competitive Bidding*, 8 F.C.F.R. 7635, ¶ 69 (1993) (noting that FCC would "extend credit" to C and F block licensees, that installment payments would "reduce the amount of private financing needed by a prospective licensee," and would "burden[] the government with the risk of default").

but it is even more true for the entrepreneurial businesses with limited capital that qualify as "designated entities."[4] And it is precisely in the context of volatile markets and capital intensive businesses that the Bankruptcy Code performs its most important role, cushioning the blow of temporary downturns and, as Congress intended, helping small and large businesses alike to avoid the economic and social disruption that attends liquidation. Thus, the very reasons the FCC gives in the Public Notice for providing relief to the reauction winners support enforcing the Bankruptcy Code as written in this case.

[4] The fact that Verizon and the other bidders in Auction 35 were relying on private financing to fund their license payments does not justify a different standard of "auction integrity." This is especially true in light of the fact that the FCC proposes to release the Auction 35 bidders from their bids, while the NextWave reorganization would have paid the FCC in full.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief for respondents, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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